

No. 41633-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

ASLAN M. JEFFREY, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Judge Toni A. Sheldon

No. 10-1-00120-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. A police officer testified that he witnessed Jeffery committing the charged crime and that he recognized him from prior contacts. Where the only identification evidence presented at trial was the eye-witness identification of the officer, was the evidence sufficient to sustain Jeffery's conviction?
2. Where no prejudice resulted, is a new trial required where the prosecutor who questioned a police witness about Jeffery's silence prior to his voluntary statement?

B. FACTS AND STATEMENT OF THE CASE

The State accepts Jeffery's statement of facts for the purposes of the issues presented but also supplements with a few additional facts and citations as necessary to develop the State's arguments, below.

C. ARGUMENT

1. A police officer testified that he witnessed Jeffery committing the charged crime and that he recognized him from prior contacts. Where the only identification evidence presented at trial was the eye-witness identification of the officer, was the evidence sufficient to sustain Jeffery's conviction?

Evidence is sufficient to sustain a jury verdict of guilty if "any rational trier of fact could find guilt beyond a reasonable doubt" when

"viewing the evidence in the light most favorable to the State." *State v.*

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Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* at 201. The reviewing court defers to the jury and its findings in regard to resolving conflicting testimony and weighing the persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Jeffery claims that the jury had insufficient evidence with which to find beyond a reasonable doubt that it was he who was driving the ATV that eluded pursuing officers in this case. To the contrary of Jeffery's assertions, however, the jury had sufficient evidence to prove his identity.

Officer Fiola testified that he knew Jeffery from three to five prior contacts, that he contacted him again earlier on the day preceding the elude in this case, that he clearly saw his nose and eyes as Jeffery drove by him during the elude, and that he had no doubt that it Jeffery who he saw driving the ATV during the elude. RP 42-43, 45, 53. The jury in this case resolved the conflicting testimony, weighed the persuasiveness of it, and found Jeffery guilty beyond a reasonable doubt. RP 118.

2. Where no prejudice resulted, is a new trial required where the prosecutor who questioned a police witness about Jeffery's post-arrest silence prior to his voluntary statement?

During rebuttal testimony the prosecutor called Officer Moran to testify. RP 79-80. While questioning the officer, the prosecutor improperly asked the officer whether he had attempted to ask Jeffery about the elude incident and whether Jeffery agreed to give a statement. RP 80. This question was preliminary to the real point, which was that as the officer was leaving Jeffery blurted out that his brother was the one who was driving the ATV. RP 80.

A defendant's constitutionally permitted silence cannot be used as substantive evidence of guilt. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

In the instant case, the prosecutor did not offer the Jeffery's initial silence, which was later followed by a voluntary statement, as evidence of his guilt. The record indicates that, while the prosecutor's question regarding the initial silence was improper and served no purpose, it was merely preliminary to the context of Jeffery's blurted out retort to the officer that it was Jeffery's brother, and not Jeffery, who was driving the ATV during the elude. This statement by Jeffery became important after

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the defense presented Jeffery's brother as an alibi witness. RP 71-75, 77-78.

Where a police officer directly testifies that a defendant refused to give a statement, there is constitutional error that requires a constitutional harmless error analysis. *State v. Romero*, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002). A mere reference to a defendant's silence, where the silence is not offered as substantive evidence to prove guilt, is not reversible error. *State v. Lewis*, 130 Wn.2d 700, 706-707, 927 P.2d 235 (1996). Thus, in the instant case, a mere reference to silence does not warrant reversal unless Jeffery can show prejudice. *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999).

Jeffery did not testify at trial. It was, therefore, obvious to the jury that Jeffery was exercising his right to remain silent. "Most jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." *State v. Lewis*, 130 Wn.2d at 700, 706, 927 P.2d 235 (1996). It was error for the prosecutor to elicit testimony from the officer that Jeffery declined to give a statement before he waived his right to remain silent and volunteered a statement, but there was no resulting prejudice in this case because there inference or argument that

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Jeffery's pre-statement silence was substantive evidence of his guilt. *State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999); *State v. Lewis*, 130 Wn.2d at 700, 706, 927 P.2d 235 (1996).

It follows that, on the facts of Jeffery's case, the prosecutor's question and the officer's answer were an indirect comment rather than a direct comment and that, therefore, the correct standard on review is the non-constitutional harmless error standard rather than the constitutional harmless error standard. *State v. Pottorff*, 138 Wn. App. 343, 346-348, 156 P.3d 955, 957 - 958 (2007), citing *State v. Romero*, 113 Wn. App. 779, 54 P.3d 1255 (2002). The constitutional harmless error test requires that the error be harmless beyond a reasonable doubt; the non-constitutional error test requires that "no reasonable probability exists that the error affected the outcome." *Pottorff*, 138 Wn. App. at 347, citing *Romero*, 113 Wn. App. at 791-92.

The State asserts that on the facts of the instant case, the prosecutor's error was harmless by either standard. It was obvious to the jury that Jeffery was exercising his right to remain silent, and his silence was never inferred or argued to be substantive evidence of his guilt. The fact that he initially declined to talk about the cluding incident, before he then waived his right to remain silent and volunteered that it was his

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brother who was driving the ATV, was mentioned only in passing. The only argument, and the only point, from the statement was to rebut his brother's trial testimony when the brother testified as an alibi witness for Jeffery. On these facts, the reference to Jeffery's pre-waiver silence was error, but was not prejudicial.

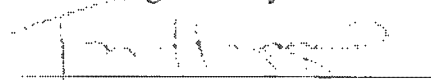
D. CONCLUSION

The jury heard the evidence in the case, including the officer's eye-witness identification testimony, weighed it, and found Jeffery guilty. The evidence was sufficient to identify Jeffery.

The prosecutor erred by asking a police witness a question that led to testimony regarding Jeffery's silence prior to his voluntary statement. However, the evidence was not argued to be evidence of guilt and was harmless beyond a reasonable doubt.

DATED: October 3, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 41633-6-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
ASLAN JEFFERY,)	
)	
Appellant,)	
_____)	


I, TIM HIGGS. declare and state as follows:

On TUESDAY, OCTOBER 3, 2011, after 5:00 p.m., I deposited in
the U.S. Mail, postage properly prepaid, the documents related to the above
cause number and filed with the court on the same day, BRIEF OF
RESPONDENT, to:

Patricia A. Pethick
P.O. Box 7269
Tacoma, WA 98417

I, TIM HIGGS, declare under penalty of perjury of the laws of the
State of Washington that the foregoing information is true and correct.

Dated this 4th day of October, 2011, at Shelton, Washington.



Tim Higgs (25919)

MASON COUNTY PROSECUTOR

October 03, 2011 - 5:23 PM

Transmittal Letter

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Court of Appeals Case Number: 41633-6

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Supplemental Designation of Clerk's Papers

Statement of Arrangements

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Answer/Reply to Motion: ____



Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

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Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Sender Name: Tim J Higgs - Email: **timh@co.mason.wa.us**